BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVERADO C. CERVANTES	)	
Claimant	)	
	)	
VS.	)	Docket No. **1,034,837**
	)	
ACME FOUNDRY, INC.	)	
Self-Insured Respondent	)	

ORDER

Everado C. Cervantes requests review of the February 16, 2009 Award by Administrative Law Judge Thomas Klein. The Board heard oral argument on June 9, 2009.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Paul M. Kritz of Coffeyville, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the Wage Stipulation filed on December 22, 2008, was incorrect. The parties further stipulated that Cervantes' average gross weekly wage was $657.74. Consequently, the Award will be modified to reflect the correct average gross weekly wage.

ISSUES

The sole disputed issue litigated by the parties was the nature and extent of Cervantes' disability. The Administrative Law Judge (ALJ) limited Cervantes' compensation to his functional impairment. The ALJ determined Cervantes failed to make a good faith effort to retain accommodated work that paid an average weekly wage at least 90 percent of his pre-injury average weekly wage. The ALJ found Cervantes refused to attempt an assignment to another job that was within his restrictions.

Cervantes argues that he is entitled to a work disability as he was constructively terminated because the assignment to the different job would have required him to exceed his restrictions. In the alternative, Cervantes argues that the good faith requirement is not

supported by the workers compensation statutes and should be abandoned as a plain reading of K.S.A. 44-510e does not contain that requirement.

Respondent argues Cervantes was provided accommodated work within his restrictions and had he not refused the assignment to a different job within his restrictions, he would still be accommodated and making the same wage. Consequently, respondent requests that the ALJ's Award be affirmed.

The sole issue for Board determination is the nature and extent of disability, specifically, whether Cervantes is entitled to a work disability.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Cervantes worked as a grinder machine operator for approximately seven years. He was required to lift different sizes of parts with variable weights and then grind off the extra metal on the parts. On March 14, 2007, Cervantes was pulling on a heavy piece of metal when he felt a sudden sharp pain in his middle back, neck and shoulder. He was treated by the company nurse and then later referred to Dr. Coles. X-rays were taken which revealed a normal right shoulder and scapula. The doctor ordered occupational therapy at Coffeyville Regional Medical Center and placed restrictions on Cervantes.

Respondent placed Cervantes in a job that was within the restriction of no lifting over 25 pounds. Although Cervantes testified that respondent then attempted to assign him to a job that exceeded his restriction he also testified that he did not know what job he was being sent to perform. In any event, he objected to the reassignment and was told to go do the work or leave. So he left.

Jason Zimmerman, respondent's human resource director, testified that respondent had accommodated claimant's restrictions by placing him in the melting department and also would have allowed him to continue his therapy. Mr. Zimmerman further testified that claimant would have been earning the same wages had he stayed employed.

Cervantes had applied for work but was still unemployed at the time of his deposition on September 17, 2008. No medical treatment has been received since his termination from respondent's employment. Cervantes is currently taking over-the-counter medications for pain.

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[1] A permanent partial general disability greater than the functional impairment rating as defined by K.S.A. 44-510e.

Dr. Pedro Murati examined claimant on May 31, 2007, at the request of claimant's attorney. Dr. Murati performed a physical examination and found that claimant had trigger points noted in his right shoulder girdle extending into the cervical and thoracic paraspinals. The doctor diagnosed claimant as having myofascial pain syndrome affecting the right shoulder girdle extending into the thoracic and cervical paraspinals as well as right shoulder pain with severe AC crepitus. Dr. Murati recommended physical therapy with myofascial pain release techniques, cortisone trigger point injections, anti-inflammatory medications and also medication for pain.

On February 7, 2008, claimant was again examined and evaluated by Dr. Murati due to complaints of pain in his shoulder, neck and upper back as well as numbness in his right hand. The doctor opined that claimant's diagnosis was due to his work-related injury on March 14, 2007, with respondent. Based upon the AMA *Guides*[2], the doctor concluded claimant had an 8 percent right upper extremity impairment or 5 percent whole person impairment due to the severe AC crepitus. For the myofascial pain syndrome affecting the cervical paraspinals, the doctor placed him in Cervicothoracic DRE Category II for a 5 percent whole person impairment. Another 5 percent whole person impairment (Thoracolumbar DRE Category II) was given to claimant for the myofascial pain syndrome affecting the thoracic paraspinals. Using the Combined Values Chart, Dr. Murati opined the whole person impairments result in a 15 percent whole person impairment. The doctor imposed permanent restrictions that in an 8-hour day the claimant should engage in no crawling, squatting or climbing ladders. He should also avoid lifting, carrying, pushing, pulling greater than 20 pounds. Claimant should avoid awkward positions of the neck and no above shoulder work on the right as well as no work more than 18 inches from the body.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Ms. Terrill and concluded claimant could no longer perform 5 of the 16 tasks for a 31.25 percent task loss.

On August 27, 2007, the ALJ ordered an independent medical examination by Dr. Pat Do to determine whether or not claimant needs additional medical treatment, and if so, he is authorized to treat him. Dr. Do performed a physical examination on October 23, 2007, and diagnosed claimant as having myofascial neck and thoracic pain which was related to his accident on March 14, 2007. The doctor placed claimant in the DRE Cervicothoracic Category II for a 5 percent whole person impairment due to neck and thoracic pain. Claimant was at maximum medical improvement and no permanent restrictions were needed. Dr. Do reviewed the list of claimant's former work tasks prepared by Ms. Terrill and opined that claimant could perform 16 out of the 16 tasks which results in no task loss.

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Karen Terrill, a vocational rehabilitation counselor, conducted a personal interview with claimant on December 17, 2007, at the request of claimant's attorney. She prepared a task list of 16 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, the claimant was unemployed. Ms. Terrill opined claimant was capable of earning from $6.55 to $7 an hour or between $262 and $280 a week.

Dr. Murati rated claimant with a 15 percent whole person functional impairment. Dr. Do rated claimant with a 5 percent whole person functional impairment. The ALJ found both opinions credible and concluded claimant suffered a 10 percent whole person functional impairment. The Board agrees and affirms that finding.

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A. Supp. 44-510d, his entitlement to permanent disability benefits is governed by K.S.A. Supp. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual post-injury wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[5]

Accordingly, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[6] As noted, in *Foulk*[7], the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability by refusing an accommodated job that paid a comparable wage. Employers are encouraged to accommodate an injured worker's medical restrictions. But in so doing, employers must also act in good faith.[8] In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine[9] or not within the worker's medical restrictions.[10]

And in *Mahan*[11], the Kansas Court of Appeals held that when an employee has failed to make a good faith effort to retain his or her current employment, *any* showing of the potential for accommodated work at the same or similar wage rate precludes an award for work disability.

> We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be

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[5] *Id.* at 320.

[6] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Niesz v. Bill's Dollar Stores*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[9] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[10] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[11] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. 790 (2006).

> unfair under circumstances where the employee has refused to make himself or herself eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.[12]

Cervantes argues the foregoing case law is no longer binding as it is not supported by the workers compensation statutes. A literal reading of K.S.A. 44-510e would indicate claimant is entitled to consideration of a permanent partial general disability based upon his wage and task loss, if any. But the appellate courts have not always followed the literal language of the statute. Instead, the courts have, on occasion, added additional benchmarks for injured workers to satisfy before they become entitled to receive permanent disability benefits in excess of the functional impairment rating. Assuredly, the concepts of good faith effort and imputing wages are neither mentioned in K.S.A. 44-510e or any other statute in the Workers Compensation Act.

The Kansas Supreme Court has recently sent two strong signals that the Workers Compensation Act should be applied as written. In *Graham*[13], the Kansas Supreme Court rejected an interpretation of the wage loss prong in the work disability formula that did not comport with the literal reading of K.S.A. 44-510e. The Kansas Supreme Court wrote, in part:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.[14]

Moreover, in *Casco*[15], the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is

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[12] *Id.* at 321.

[13] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[14] *Id.* at Syl. ¶ 3.

[15] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

> not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[16]

Despite the Kansas Supreme Court's clear signals to follow the literal language of the Act, it is not for this Board to substitute its judgment for that of the appellate courts. The Board, therefore, will continue to follow the *Foulk* and *Copeland* line of cases until an appellate court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a claimant's wage earning ability whenever a claimant fails to prove he or she made a good faith effort to find or retain appropriate employment post-injury.

Following that precedent, the Board has also held workers are required to make a good faith effort to obtain and retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.

The respondent had provided accommodated work for claimant that was within his restrictions. Respondent then requested that claimant temporarily perform a different job but claimant testified that he was happy where he was and did not want to transfer to the different work because he thought the hours would be longer. Consequently, claimant refused to even try the work and admitted that he did not know if he would be required to exceed his lifting restriction of 25 pounds. Respondent's human resources director testified the job was within claimant's restrictions and respondent would have continued to accommodate claimant's need to attend physical therapy sessions. Moreover, the claimant's wage would have remained the same.

The ALJ determined that claimant voluntarily left his employment without even attempting to perform the accommodated job he had been assigned and consequently he was not entitled to a work disability award. In this case, as in *Foulk* , claimant refused to even attempt the accommodated job. Accordingly, he is not entitled to a work disability analysis and the wage he was earning will be imputed to him. Because that wage was 90 percent or more than his pre-injury average gross weekly wage claimant's permanent partial disability compensation is limited to his 10 percent whole person functional impairment.

As previously noted, the ALJ's Award will be recalculated based upon the parties' stipulation that claimant's average weekly wage was $657.74.

AWARD

[16] *Id.* at Syl. ¶ 6.

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated February 16, 2009, is modified to reflect an average weekly wage of $657.74 and affirmed in all other respects.

The claimant is entitled to 4.32 weeks of temporary total disability compensation at the rate of $438.52 per week or $1,894.41 followed by 41.50 weeks of permanent partial disability compensation at the rate of $438.52 per week or $18,198.58 for a 10 percent functional disability, making a total award of $20,092.99, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of August 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Paul M. Kritz, Attorney for Respondent
Thomas Klein, Administrative Law Judge